No. 93-1669

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

A.J. ARAVE, WARDEN,

Petitioner,

v.

DONALD KENNETH FETTERLY,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Respondent Donald Kenneth Fetterly believes the question presented by the Petition for Writ of Certiorari is properly characterized as follows:

Whether, in a first federal habeas corpus action, a District Court abuses its discretion when it denies a motion to stay its proceedings to allow amendment of the petition and bases that denial upon its erroneous sua sponte conclusion that the claims could not be of federal constitutional dimension.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respondent Donald Kenneth Fetterly requests that the Court deny the Petition for Writ of Certiorari. Contrary to petitioner's statement (Petition at 1), the Court of Appeals has not "granted federal habeas relief vacating the prisoners sentence of death." Rather, the Court of Appeals merely reversed the District Court's effective denial of leave to amend Mr. Fetterly's

petition and remanded to the District Court to consider the claims.

STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions provided by petitioner, the text of the following statutory provisions relevant to determination of the Petition are set forth in the Appendix at the end of this Response: Idaho Code §§ 19-2719, 19-2827, 19-4902, 19-4908.

STATEMENT OF THE CASE

A. INTRODUCTION

The Warden challenges a unanimous Ninth Circuit panel decision, authored by Judge Trott, and joined by Judges Leavy and Schroeder, which ordered a partial remand to the District Court of Mr. Fetterly's first federal habeas corpus action. Both the procedural posture of this action, largely disregarded in the Petition, and the lack of merit to Petitioner's arguments call for denial of the Petition.

The Court should deny the Petition because (a) final judgment has not yet been entered in this matter, and petitioner has not "show[n] that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court," Supreme Court Rule 11; (b) the Court of Appeals'

decision is consistent with the decisions of the Court; and (c) the Court of Appeals' decision does not conflict with decisions of other Courts of Appeal or state supreme courts.

B. BACKGROUND--THE TRIAL

Mr. Fetterly and Karla Yvonne Windsor were separately tried and convicted for the murder of one individual.

Seven days after Ms. Windsor's separate trial, the Honorable Edward J. Lodge held an Aggravation and Mitigation Hearing to determine Mr. Fetterly's sentence. Because of the timing of the severed trials, Judge Lodge, before sentencing Mr. Fetterly, heard evidence not contained in the record in Mr. Fetterly's case--evidence that had only been submitted in his co-defendant's trial. The prosecuting attorney specifically invited the court to consider this evidence at Mr. Fetterly's sentencing hearing:

> Mr. Harris: Finally, we look at the manner in which this crime was committed. The court has listened to the evidence both in this case and in the companion case of Windsor.
>
> Mr. Bishop: I object to the reference of any evidence presented in the Windsor case as not being appropriate in this court.
>
> Court: Overruled.

Transcript, Vol. II, at 445-46 (Feb. 24, 1984). Consistent with its ruling on this objection, the court considered evidence presented only at Ms. Windsor's trial in sentencing Mr. Fetterly. See Transcript, Vol. II, at 467 (Feb. 21, 1984); Clerk's Record Docket No. 15419 ("R.") at 240-41.

Judge Lodge sentenced Mr. Fetterly to death. In deciding to do so, Judge Lodge concluded that:

> the mitigating circumstances do not outweigh the gravity of the aggravating circumstances so as to make unjust the imposition of the death penalty.

R. at 244. Mr. Fetterly's public defender did not object to this method of weighing all the mitigating factors against all the aggravating factors at once.

After Mr. Fetterly's direct appeal and first state post-conviction appeal, the Idaho Supreme Court ruled that the "plain meaning" of Idaho Code § 19-2515(c) mandates that the sentencing court weigh all mitigating circumstances against each aggravating circumstance individually. State v. Charboneau, 116 Idaho 129, 774 P.2d 299, 323, cert. denied, 493 U.S. 922 (1989). The court specifically noted that the plain wording of Idaho Code § 19-2515(c) "dictated" this conclusion. Id.

C. DIRECT APPEAL AND FIRST STATE COLLATERAL PROCEEDING

Mr. Fetterly appealed his conviction and sentence to the Idaho Supreme Court. In Idaho, a death penalty defendant's direct appeal is joined with the mandatory review specified in Idaho Code § 19-2827.[1] Mr. Fetterly's conviction and death sentence were upheld. State v. Fetterly, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870 (1986).[2]

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[1]This Idaho statutory provision operates to result in exhaustion of issues of the constitutionality of a death sentence not specifically raised by the defendant in his appeal. Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 114 S. Ct. 1631 (1994).

[2]Mr. Fetterly's co-defendant's fate has been drastically different. Ms. Windsor also was sentenced to death by Judge Lodge. However, the Idaho Supreme Court vacated that sentence on the grounds that it was disproportionate to the sentences of others who have or have not been sentenced to die. State v. Windsor, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964 (1986). On remand for resentencing, Judge Lodge recused himself because he believed that Ms. Windsor was equally as or more culpable than Mr. Fetterly and that both were deserving of the death penalty. He stated:

> [Windsor has] escaped punishment for [her] actions equivalent to [that] imposed on [her] co-defendant[] . . . . Despite a record which strongly indicated that . . . Windsor [was] the motivating force[] behind the commission of the crime and [was] the catalyst[] which set the crime[] in motion, . . . it is clear that . . . Windsor . . . knew that the victim was to be killed and [was] actively and inextricably entwined in the victim's fate.

State v. Beam, 115 Idaho 208, 766 P.2d 678, 688 (1988) (quoting Order of Disqualification by Judge Edward J. Lodge,

Mr. Fetterly's original counsel filed a state court post-conviction petition on February 28, 1986. All requested relief in the post-conviction petition was denied. See State v. Fetterly, 115 Idaho 231, 766 P.2d 701 (1985), cert. denied, 492 U.S. 925 (1989).

D. PARALLEL PROCEEDINGS IN A HABEAS CORPUS PETITION BEFORE THE DISTRICT COURT AND A POST-CONVICTION PETITION IN STATE COURT

1. The Habeas Corpus Petition

Mr. Fetterly, through his original public defender, filed his petition for writ of habeas corpus with the United States District Court for the District of Idaho on April 10, 1989. The District Court, for several months, sought second counsel to represent Mr. Fetterly. Ultimately, Thomas J. McCabe was appointed. Until then, Mr. Fetterly had been represented continuously by only his trial public defender.

Mr. Fetterly's new counsel quickly recognized that there were additional issues that Mr. Fetterly had not raised before the state court. That counsel thus took two parallel steps to litigate

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in Canyon County Case No. C-5527 (May 16, 1986)) (emphasis in original), cert. denied, 489 U.S. 1073 (1989). When resentenced by a different judge, Ms. Windsor received an indeterminate life sentence--making her eligible for parole today. State v. Windsor, No. C-5576 at 9 (Sentencing Opinion Dec. 16, 1986).

those issues--filed a second state court post-conviction petition and sought a stay of the federal habeas corpus proceeding so that the exhausted claims could be added by amendment.

2. Petition for Collateral Relief

Mr. Fetterly filed the second state court petition for post-conviction relief on June 15, 1990.[3] In that proceeding, Mr. Fetterly asserted that he was entitled to be resentenced because (a) the judge who sentenced him to death had not weighed all mitigating circumstances against each aggravating circumstance as required by Idaho Code § 19-2515(c); (b) the sentencing court improperly relied on testimony from the trial of Mr. Fetterly's co-defendant for which Mr. Fetterly was not present or given an opportunity to confront; and (c) Mr. Fetterly was denied effective assistance of counsel.

3. The Motion to Stay the Habeas Corpus Petition

Mr. Fetterly sought a stay of the habeas corpus petition during the pendency of his second state petition for collateral relief so that he

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[3]Petitioner erroneously states that this proceeding was not initiated until Mr. Fetterly's habeas petition was before the Court of Appeals. Petition at 5. The District Court did not deny Mr. Fetterly's motion to stay until August 1, 1990. See 744 F. Supp. at 966.

could add the exhausted claims to his petition. The District Court denied the motion. The court, in a "sua sponte" decision, held that as a matter of law the issues that Mr. Fetterly wanted to litigate in state court were not of federal constitutional dimension. Fetterly v. Paskett, 744 F. Supp. 966, 976 (D. Idaho 1990).

4. Denial of the Second State Post-Conviction Petition on the Merits

Idaho never filed a responsive pleading to Mr. Fetterly's second state post-conviction petition. Mr. Fetterly, therefore, filed a motion for summary judgment in his favor. However, the court, summarily and without notice, dismissed Mr. Fetterly's claims.[4]

On appeal, the Idaho Supreme Court, as an initial matter, dismissed the state's argument that the procedural rule of Idaho Code § 19-2719 (which requires that all claims that are known or should have been known be presented in a first petition for collateral relief) barred consideration of the substantive issues. Fetterly v. State, 825 P.2d 1073, 1074 (Idaho 1991), cert. denied, 113 S. Ct. 607 (1992). The court stated that Idaho's argument

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[4]Compare Idaho Code § 19-4906 (20-day notice required before a petition for post-conviction relief is summarily dismissed).

"misses the real issue." The court continued, "[t]he real issue is whether Charboneau applies retroactively to cases that were final at the time of its issuance." Id.[5]

As to the merits, the court held that the proper interpretation of Idaho's death penalty statute--as set forth in Charboneau--need not be applied to Mr. Fetterly. The court reasoned that Charboneau did not have to be applied retroactively. Id. at 1074-75 (citing Griffith v. Kentucky, 479 U.S. 314 (1987)).

Because the Idaho Supreme Court reached the state and federal merits of the applicability of Charboneau to Mr. Fetterly, it apparently believed that the alternative issue of the effectiveness of Mr. Fetterly's counsel was moot. The court stated, without explanation, that its "holding necessarily disposes of [Mr. Fetterly's] ineffective assistance of counsel claim." Id. at 1075. Nevertheless, in dicta, the court stated its belief that the

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[5]Justice Johnson of the Idaho Supreme Court concurred in the result. However, in contrast with the majority, he stated that the appeal should have been dismissed based on what he perceived as independent state grounds--preclusion under Idaho Code § 19-2719. See Fetterly v. State, 825 P.2d 1073, 1075 (Idaho 1991).

Petitioner thus inaccurately asserts that the Idaho Supreme Court dismissed the case based upon procedural default. Petition at 23 n.5.

ineffective assistance of counsel claim was "waived" when it was not presented in Mr. Fetterly's first post-conviction petition, notwithstanding ineffective counsel's continued representation. Id.

The Idaho Supreme Court, like Petitioner here, failed entirely to address the last issue before it--whether Mr. Fetterly's confrontation clause and due process rights were violated by the sentencing judge's consideration of evidence from the co-defendant's trial.[6]

E. PROCEEDINGS IN THE FEDERAL HABEAS CORPUS PETITION

In addition to denying Mr. Fetterly's motion for a stay, the District Court denied relief on all the substantive issues raised in the habeas corpus petition. See Fetterly v. Paskett, 744 F. Supp. 966 (D. Idaho 1990); Fetterly v. Paskett, 747 F. Supp. 594 (D. Idaho 1990). All these issues, including the denial of the stay request, were timely appealed.

On July 9, 1993, the Court of Appeals issued the decision that is the subject of this Petition. Fetterly v. Paskett, 997 F.2d 1295 (1993),

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[6]The Idaho Supreme Court also held that Mr. Fetterly's rights under Idaho Code § 19-4906 were not violated by the summary dismissal of his petition without 20 days notice. Id. at 1074.

App. 1-19. The Court of Appeals denied a petition for rehearing and suggestion for rehearing en banc on January 24, 1994, with Judge Trott (the author of the panel's decision) writing a concurring opinion (App. 39-51) in response to the dissent from the denial of rehearing en banc (App. 20-38). Fetterly v. Paskett, 15 F.3d 1472 (1994).

The Court of Appeals did not reach the numerous substantive claims raised in Mr. Fetterly's appeal. Instead, it held only that the District Court's sua sponte decision denying Mr. Fetterly's motion to stay the habeas corpus proceedings was an abuse of discretion. App. 10-11. The court ordered that the case be remanded to the District Court to allow amendment of the habeas corpus petition and for full consideration of whether the added claims were procedurally preserved and, if so, were meritorious. App. 10, 18-19.

The Court of Appeals did not decide the merits of the claims that were to be added in the amended habeas corpus petition. The court likewise did not reach the various questions relating to whether those claims were procedurally defaulted. Rather, it only decided that at least one of the claims that Mr. Fetterly intended to add raised a colorable federal constitutional issue and,

therefore, that the District Court abused its discretion in denying the stay request based on its determination that that issue was exclusively a matter of state law.[7] See App. 8.

SUMMARY OF REASONS THE COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

1. The Court of Appeals has not entered judgment. Petitioner has not satisfied the standard for pre-judgment petitions for writ of certiorari.

2. This case presents itself to the Court upon the Court of Appeals' decision that a partial remand to the District Court is appropriate because the sole stated reason for the District Court's denial of Mr. Fetterly's motion for a stay was erroneous. The District Court sua sponte, and without adequate briefing, had determined that the claims Mr. Fetterly sought to litigate raised no federal constitutional issues. The District Court did not consider the procedural setting of those claims. Likewise, the Court of Appeals had no reason to address such issues. Instead, its

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[7]Petitioner did not request that the Court of Appeals retain the mandate, and therefore the case is proceeding upon the remand to the District Court. In fact, the District Court has set a briefing schedule that calls for Mr. Fetterly to file his amended petition by September 1, 1994. There is no reason to believe that ultimate resolution of Mr. Fetterly's claims would be expedited at all by grant of the certiorari petition.

analysis ended upon its conclusion that Mr. Fetterly's claims could be of federal constitutional dimension.

The Warden's procedural contentions should first be considered by the lower courts. The outcome of those issues may make action by this Court unnecessary.

3. The Court is asked to decide constitutional issues that were never even briefed to the District Court due to that court's sua sponte decision, and Petitioner has not even addressed all of the federal claims that the District Court was ordered to consider. Nevertheless, full review upon a proper record would indicate that not only was the Court of Appeals correct that Mr. Fetterly raised legitimate constitutional issues, but that he is entitled to a new sentencing based on those claims.

4. The Court of Appeals' decision is dictated by the Court's previous decisions. As such, the rule of Teague v. Lane does not bar the partial remand that has been ordered.

ARGUMENT

A. THE PROCEDURAL POSTURE OF THIS CASE ADVISES AGAINST GRANTING THE PETITION

1. The Court of Appeals Only Ordered a Limited Remand

The Court of Appeals' decision clearly indicates that it ordered only "a limited remand" to allow Mr. Fetterly an opportunity to file "a unitary amended [habeas corpus] petition in federal district court." App. 18, 11. The court specifically noted that it "will hold in abeyance a determination on Fetterly's other claims which we conclude[, in contrast,] were fully developed in the district court." App. 10. The Court of Appeals' goal in issuing the remand was to "avoid piecemeal adjudication in the court of appeals." App. 10.

The Court of Appeals made clear that "[b]ecause there is no petition before us in which [Mr. Fetterly's] claims of § 19-2515(c) error and related ineffective assistance of counsel are spelled out, we reiterate that we are in no position to render an informed opinion on the merits of these subjects." App. 18. The Court of Appeals wanted all issues litigated in District Court before being presented to it. In short, the decision below is nothing more than an appellate court's exercise of control over its docket.

2. Petitioner Has Not Made the Showing Required For Supreme Court Review of a Pre-Judgment Decision

The Court of Appeals order does not constitute a final judgment. Supreme Court Rule 11 states:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. § 2101(e).

Petitioner has made no attempt to make the showing required by this rule. Consequently, the Court should deny the Petition.

3. The Constitutional Arguments Raised By Petitioner Have Not Been Fully Briefed and Resolved Below

As the Court of Appeals specifically noted, the procedural context of the case did not permit it "to render an informed opinion on the merits" and the procedural objections to the claims it was remanding. App. 18. Likewise, this Court should not accept review to decide whether these claims have merit or are procedurally barred. Rather, these issues should be fully briefed to and considered by the District Court first.

As Judge Trott's decision noted, "the Charboneau issue is shrouded" by numerous other legal issues. App. 18-19. In addition, it now is

also necessary to determine how, if at all, the Court of Appeals' recent decision in Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993) (Idaho's mandatory review of death sentences results in exhaustion of issues relating to that sentence), cert. denied, 114 S. Ct. 1631 (1994), impacts this case. Beam appears to provide an additional reason why the claims Mr. Fetterly sought a stay in order to litigate in state court were not barred by procedural default.

Finally, petitioner ignores entirely Mr. Fetterly's argument that he is also entitled to be resentenced because the sentencing judge impermissibly considered evidence from Mr. Fetterly's co-defendant's trial. Consideration of this evidence clearly violated the rule set forth in Gardner v. Florida, 430 U.S. 349 (1977). It hardly makes sense for this Court to grant prejudgment of only some of the federal claims that are to be considered by the District Court on remand.

B. THE COURT OF APPEALS DECISION IS LIMITED TO THE DISTRICT COURT'S STATED BASIS FOR ITS DENIAL OF THE STAY

Petitioner asserts a parade of horribles not presented by this case. Petitioner states:

> The Court of Appeals decision effectively authorizes a federal stay of execution in a death penalty

> case while habeas petitioners attempt to present procedurally barred claims in state courts.

Petition at 23. From this, Petitioner threatens that a habeas petitioner could repeatedly force the federal court to hold its proceedings in abeyance. Petition at 24.

First of all, Petitioner completely ignores the procedural context in which this case presents itself. The Court of Appeals merely reviewed the reasons stated in the District Court's sua sponte order. As Judge Trott's opinion makes clear, the various questions pertaining to the procedural contexts of Mr. Fetterly's claims were not addressed by the District Court, and were not properly before the Court of Appeals.

The Court of Appeals decision would not prevent a district court in another case from determining that claims that a habeas petitioner requests to litigate are procedurally barred and thus without merit. Assuming such determination were correct, denial of a stay and leave to amend could be appropriate. The Court of Appeals specifically noted that "[t]here is nothing at all in this record to suggest that [Mr. Fetterly's] motion for a stay was brought to delay, to vex, or to harass." App. 18.

C. THE COURT OF APPEALS CORRECTLY RULED THAT MR. FETTERLY'S REQUEST FOR A STAY WAS TO RAISE ISSUES OF FEDERAL CONSTITUTIONAL DIMENSION

As explained above, the Court of Appeals did not reach the merits of the constitutional issues raised. However, the court did explain why Mr. Fetterly had a colorable federal claim. For the following reasons, the Court of Appeals was correct that these issues of worthy of full briefing and consideration before the District Court, so that the Ninth Circuit and ultimately this Court can have a proper foundation for performing their functions.

1. Mr. Fetterly Was Not Sentenced As Required By Idaho's Death Penalty Statute

Stating clearly that "[t]he plain meaning of the statute [Idaho Code § 19-2515(c)] dictates our conclusion," the Idaho Supreme Court held in State v. Charboneau, 116 Idaho 129, 774 P.2d 299, 323, cert. denied, 493 U.S. 922 (1989) (emphasis added), that "the trial court may sentence the defendant to death, only if the trial court finds that all mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust."

"It is beyond cavil that the court in this case did not engage in the balancing procedure

mandated by the legislature when it enacted Idaho Code § 19-2515(c)." Fetterly v. State, 825 P.2d 1073, 1076 (1991) (Bistline, J., dissenting). "No one disputes that the [trial] court did not engage in the balancing procedure mandated by the legislature in I.C. § 19-2515(c)." Id. at 1081 (Bistline, J., dissenting from denial of rehearing).

2. Contrary to Petitioner's Repeated Protestations, Charboneau Did Not Establish a New Balancing Procedure

Petitioner concedes that the statutory provision requiring that each aggravating factor be balanced against all mitigating factors "has remained unchanged since it was first enacted in 1977." Petition at 13. Nevertheless, Petitioner repeatedly asserts that the Charboneau decision established a new method by which balancing was to be done in Idaho.[8] Petitioner's assertion does not stand up to scrutiny.

The two cases that Petitioner relies upon do not address the issue decided in Charboneau (the method of balancing), but instead merely discuss

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[8]Petitioner, inconsistently, asserts elsewhere that the Charboneau decision has no practical effect on how sentencing decisions are made. See, e.g., Petition at 5, 21-22. There is no reason to believe that ultimate resolution of Mr. Fetterley's claims would be expedited at all by grant of the certiorari petition.

the applicable burden of proof. See State v. Osborn, 631 P.2d 187, 198-99 (Idaho 1981) (issue raised was whether Idaho's death penalty statute "impermissibl[y] shift[ed] the burden of proof to the defendant"); State v. Sivak, 105 Idaho 900, 674 P.2d 396, 401 (1983) (issued raised was whether Idaho's death penalty statute was "unconstitutional because it does not require the trial judge to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt") (emphasis added), cert. denied, 468 U.S. 1220 (1984).[9] Neither of these cases, nor any other case decided prior to Charboneau, interpreted Idaho Code § 19-2515(c) to allow balancing of all aggravating factors against all mitigating factors.[10]

In subsequent proceedings, Sivak did challenge the manner in which factors were weighed and was granted a re-sentencing in conformity with Charboneau. See fn. 12, infra.

[10]Indeed, the Idaho Supreme Court reiterated in Osborn that sentencing judges must "evaluate[] those factors under the guidelines set forth in the statute." 631 P.2d at 199 (emphasis added). Charboneau confirmed that the "plain meaning" of those very guidelines mandated weighing all mitigating factors against each aggravating factor individually.

3. Incorrect Application of a Sentencing Statute Constitutes a Violation of Due Process and Implicates the Eighth Amendment

Sentencing a person to death without following the state's own sentencing statute violates due process and results in cruel and unusual punishment. Hicks v. Oklahoma, 447 U.S. 343 (1980). This conclusion does not require an overextension or novel application of Hicks, as claimed by Petitioner.

Hicks was sentenced to 40 years in prison under a habitual offender statute. That statute was later found unconstitutional by the Oklahoma Court of Criminal Appeals. Hicks thus sought to have his sentence set aside, but the Oklahoma Court of Criminal Appeals refused, reasoning that the jury could have imposed the same sentence under the constitutionally correct version of the sentencing statute. The Court held that Hicks' right to due process had been violated, declaring:

> The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state.

447 U.S. at 346 (citations omitted).

Mr. Fetterly faces an equally arbitrary deprivation of an even more serious interest. If each aggravating circumstance had been weighed against all mitigating circumstances, Mr. Fetterly would not have been sentenced to death. However, the sentencing judge in Mr. Fetterly's case explicitly weighed all of the aggravating factors against all of the mitigating factors.[11]

4. The Constitution Mandates Equal Application of Idaho's Death Penalty Statute's Plain Meaning

Since Charboneau was decided on April 4, 1989, at least four persons sentenced to death prior to Charboneau have had their cases reevaluated to

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[11]This fits exactly within the formulation used by three members of the Court to illustrate a violation of due process under the Hicks decision:

> "[a]mbiguous jury instructions, even in a capital case, do not violate the Eighth Amendment simply because they are ambiguous," but they do violate the Due Process Clause if they misstate the law to the defendant's detriment--and it is not essential to that violation that the law as misstated be an unconstitutional law. Thus, to take the most extreme example, if state law, as authoritatively interpreted by the State's supreme court, does not authorize the death penalty for a certain offense, the Due Process Clause would not permit a state trial court to impose it even if the jury instructions comported with the Eighth Amendment.

McKoy v. North Carolina, 494 U.S. 433, 459, n.1 (1991) (Scalia, J., dissenting, joined by the Chief Justice and O'Connor, J.) (quoting Blackmun, J., concurring).

determine whether their sentences were valid under the weighing formula "dictated" by Idaho Code § 19-2515(c). Presumably, everyone sentenced to death since Charboneau received the proper weighing methodology. Consequently, in addition to Mr. Fetterly, there are no more than four others sentenced to death who have yet to receive the benefit of the weighing required by Idaho law. See Fetterly, 825 P.2d at 1079 (Bistline, J., dissenting) (noting that the administration of justice in Idaho will not be adversely effected if five individuals are afforded resentencing).

The Idaho Supreme Court rationalized that Mr. Fetterly need not be resentenced because Charboneau has never been applied to a defendant whose sentence was "final" prior to Charboneau being decided. However, Stuart v. State, 118 Idaho 865, 801 P.2d 1216 (1990), belies this statement.[12]

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[12]See also State v. Fain, 116 Idaho 82, 774 P.2d 252, 270 (denying all raised issues but remanding for resentencing in accordance with Charboneau, which was decided the same day), cert. denied, 493 U.S. 917 (1989); State v. Leavitt, 116 Idaho 285, 775 P.2d 599 (1989) (in direct appeal combined with appeal from post-conviction petition, death penalty inmate's case remanded for resentencing in light of Charboneau); State v. Sivak, 119 Idaho 320, 806 P.2d 413 (1990) (ordering resentence under Charboneau despite fact that sentence became final upon denial of appeal in State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220 (1984)).

In that collateral proceeding,[13] the Idaho Supreme Court analyzed Stuart's sentencing under the Charboneau standard, but determined, under the facts of the case, that his sentence was proper. 801 P.2d at 1223. The Idaho Supreme Court ruled that Stuart's sentence was appropriate under Idaho Code § 19-2515 because there were no mitigating circumstances in Stuart's favor. Thus, no matter how weighed (against the aggravating circumstances combined or separately), the aggravating circumstances outweighed the lack of any mitigating circumstances. 801 P.2d at 1223-24.

The result reached in Stuart, however, cannot obscure the methodology utilized. The Idaho Supreme Court definitively applied Charboneau to Stuart even though his sentence had long before been upheld on direct review. His sentence was just as "final" as was Mr. Fetterly's.

The Court has recognized that the determination whether rules are to be applied retroactively must be applied even-handedly. "[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly

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[13]Stuart's conviction and death sentence were originally upheld in State v. Stuart, 110 Idaho 163, 715 P.2d 833 (1985).

comports with the ideal of "administration of justice with an even hand."'" Teague v. Lane, 489 U.S. 288, 315 (1989) (quoting Hankerson v. North Carolina, 431 U.S. 233, 247 (1977) (Powell, J., concurring in judgment) (quoting Desist v. United States, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting))).

This consistency requirement is especially important in death penalty cases. Since at least Furman v. Georgia, 408 U.S. 238 (1972), it has been understood that the severity of a death sentence requires that greater care be taken to ensure that those subjected to it be treated proportionately and be appropriately distinguished from those who are not. See California v. Ramos, 463 U.S. 992, 990-99 (1983) ("[t]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); Barclay v. Florida, 463 U.S. 939, 954 (plurality opinion), 958-59 (Stevens, J., concurring) (1983); Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (death penalty only constitutional if the manner of selecting those who are so punished "provide[s] a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not"); Woodson v. North Carolina, 428

U.S. 280, 303-05 (1976) (opinion of Stewart, Powell & Stevens, JJ.); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

Here, the statutory interpretation articulated in Charboneau has not been uniformly applied, nor can Mr. Fetterly be adequately distinguished from those properly sentenced under Idaho's statute.

5. Mr. Fetterly Was Prejudiced By the Misapplication of Idaho Law

Citing absolutely no authority, Petitioner argues that "[t]he Charboneau weighing process has little prospect of changing the outcome of a sentencing decision." Petition at 21-22. Petitioner thus asserts that this Court should grant certiorari to review this narrow fact-specific issue, even though Mr. Fetterley has not had a chance to make a record and Petitioner has not preserved this argument in the Court below.

Petitioner need only have looked as far as the Court's decision in Stringer v. Black, 112 S. Ct. 1130 (1992), to discover the ramifications of improper weighing. In a weighing state "a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Id. at 1137. "When the weighing process itself has been skewed, only

constitutional harmless-error analysis or re-weighing . . . suffices to guarantee that the defendant received an individualized sentence." Id.

Mr. Fetterly's situation is no different: the weighing process was significantly skewed. Rather than there being one aggravating factor on death's side of Mr. Fetterly's scale, there were three.

The District Court did not deny Mr. Fetterly's motion for a stay on the basis that Mr. Fetterly was not prejudiced by any constitutional error, and the Court of Appeals was not asked to reach that issue. It is not appropriately presented for review by this Court.

D. TEAGUE V. LANE DOES NOT BAR THE COURT OF APPEALS DECISION

Petitioner's "new rule" argument confuses two distinct and separate issues. First is the issue whether Charboneau set forth a "new rule" as that term is used in Teague v. Lane, 489 U.S. 288 (1989), and its progeny. Second, and completely differently, is the issue whether the Court of Appeals' decision set forth such a "new rule" in holding that "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment

against arbitrary deprivation by a State." App. 13.

1. Charboneau Did Not Set Forth a New Rule of Constitutional Law

In Teague, a plurality of the Court declared that "'new rules' of constitutional law" would not be applied retroactively to cases on collateral review--i.e, "those cases which have become final before the new rules are announced." Id. at 310. The plurality justified this distinction by noting that the writ of habeas corpus "'serves as a necessary additional incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" Id. at 306 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Given that premise, "[t]he 'new rule' principle therefore validates reasonable, good faith interpretations of existing precedents made by state courts. . . ." Butler v. McKellar, 494 U.S. 407, 414 (1990).

The decision in Charboneau does not involve the application of new federal constitutional principles. Rather, the issue here is whether Mr. Fetterly is entitled to have the Idaho sentencing statute correctly applied in his case.

The concern of comity to the states, underlying Teague, is not implicated. Idaho has established its own statutory scheme. The federal courts have not established the rules under which Idaho must operate in this case, nor have the federal courts changed those rules. Rather, Idaho has adopted a statutory scheme, and the federal courts merely should ensure that it is uniformly followed.

Further, even if it did present a constitutional issue, Charboneau would not constitute a "new rule" under Teague, because the outcome of Charboneau was "dictated" by Idaho's statute. See Charboneau, 774 P.2d at 323 ("the plain meaning of the statute dictates our conclusion"); Teague, 489 U.S. at 301.

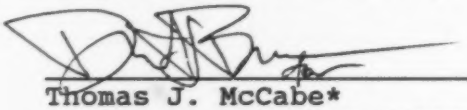
As to the federal constitutional issue that the Court of Appeals directed the District Court to consider, Petitioner mischaracterizes the Court of Appeals' decision in an attempt to argue that it established a "new rule." See Petition at 26. However, the Court of Appeals' decision was predicated on Idaho's failure to follow its own explicit statutory mandate in sentencing Mr. Fetterly. As Judge Trott bluntly stated in his concurring opinion on the denial of petition for rehearing, "Furman, Gregg, Godfrey, Woodson,

Proffit, Eddings, Gardner, and Hicks all predate Fetterly's conviction, and certainly dictate the result in this case." App. 50.

CONCLUSION

For the reasons stated, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,



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May 25, 1994.

IDAHO CODE

19-2719. Special appellate and post-conviction procedure for capital cases--Automatic stay.

The following special procedures shall be interpreted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence.

(1) When the punishment of death is imposed the time for filing an appeal shall begin to run when the death warrant is filed.

(2) The death warrant shall not be filed until forty-two (42) days after the judgment imposing the death sentence has been filed, or, in the event a post-conviction challenge to the conviction or sentence is filed, until the order deciding such post-conviction challenge is filed.

(3) Within forty-two (42) days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known.

(4) Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.

(5) If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

(6) In the event the defendant desires to appeal from any post-conviction order entered pursuant to this section, his appeal must be part of any appeal taken from the conviction or sentence. All issues relating to conviction, sentence and post-conviction challenge shall be considered in the same appellate proceeding.

(7) If post-conviction challenge is made under this section, questions raised thereby shall be heard and decided by the district court within ninety (90) days of the filing of any motion or petition for relief timely filed as provided by this section. The court shall give first priority to capital cases. In the event the district court fails to act within the time specified, the supreme court of Idaho shall, on its own motion or the motion of any party, order the court to proceed forthwith, or if appropriate, reassign the case to another judge. When the supreme court intervenes as provided, it shall set a reasonable time limit for disposition of the issues before the district court.

(8) The time limit provided in subsection (7) of this section for disposition of post-conviction claims may be extended only upon a showing of extraordinary circumstances which would make it impossible to fairly consider defendant's claims in the time provided. Such showing must be made under oath and the district court's finding that extraordinary circumstances exist for extending the time shall be in writing and shall be immediately reported to the supreme court, which shall at once independently consider the sufficiency of the circumstances shown and determine whether an extension of time is warranted.

(9) When a judgment imposing the penalty of death is filed, the clerk and the reporter shall begin preparation of the transcripts of the trial, and other proceedings, and the clerk's transcript.

(10) When the procedures specified in this section and section 19-2827, Idaho Code, have been carried out and a remittitur issued, and an execution date set as provided by law, the defendant shall be deemed to have exhausted all state remedies.

(11) A stay of execution while the special appellate procedures specified herein are followed and during the pendency of automatic review of death sentences shall be automatically entered by the clerk of the supreme court at the time the district court transmits to the supreme court the report required by section 19-2827, Idaho Code. If the sentence is upheld, the clerk shall dissolve such stay when the remittitur is filed.

Thereafter, the district court shall set a new execution date.

19-2827. Review of death sentence--Preservation of records.

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge setting forth the findings required by section 19-2515(d), Idaho Code, and such other matters concerning the sentence imposed as may be required by the Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and punishment prescribed. The report may be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Idaho.

(b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(g) The Supreme Court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.

19-4902. Commencement of proceedings--Verification--Filing--Service.

A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. An application containing claims relating to the treatment of an applicant at any correctional facility located within Idaho may only be filed within the county in which such facility is located. An application may be filed at any time within five (5) years from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The Supreme Court may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the prosecuting attorney.

19-4908. Waiver of or failure to assert claims.

All grounds for relief available to an applicant under this act must be raised in his

original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.